Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
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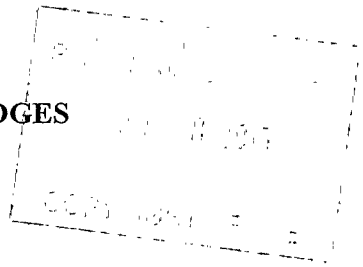

In the Matter of	
DETERMINATION OF ROYALTY RATES FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)	Docket No. 14-CRB-0001-WR (2016–2020)

Received
JUN 18 2015
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iHEARTMEDIA, INC.'S REPLY IN SUPPORT OF MOTION TO STRIKE SOUNDEXCHANGE, INC.'S "SUPPLEMENTAL TESTIMONY" OF PROFESSOR DANIEL R. McFADDEN

iHeartMedia, Inc. submits this Reply to SoundExchange's Opposition to iHeartMedia's Motion to Strike SoundExchange, Inc.'s "Supplemental Testimony" of Professor Daniel R. McFadden (June 9, 2015) ("Opposition" or "Opp.").

First, contrary to SoundExchange's assertion (Opp. at 1-3), the Motion to Strike is not an "attempt to seek reconsideration" concerning admission of Prof. McFadden's testimony, as there is no prior "ruling" to reconsider. As set forth in the Motion (at 7), the Chief Judge stated only that the Judges would give "consideration" to a further submission, and then only if "it's critical to the circumstances of this case." Tr. at 5298:5-10. At no point did the Judges *rule* that any such testimony would be admissible, let alone without a witness at the hearing to sponsor the testimony and be subjected to cross-examination on it. *See* 37 C.F.R. § 351.10(a) ("No evidence, including exhibits, may be submitted without a sponsoring witness, except for good cause shown."). In fact, when SoundExchange informed the Judges it had submitted the Supplemental Testimony, the Chief Judge stated that she "was surprised" to see it. Tr. at 7376:6-7.[1]

[1] Nor is SoundExchange correct in claiming (Opp. at 2) that iHeartMedia concedes that Prof. McFadden's new testimony is critical. iHeartMedia opposes submission of the Supplemental Testimony

Second, and in any event, SoundExchange is wrong that iHeartMedia suffers "[n]o [p]rejudice" from the submission of Prof. McFadden's last-minute, untested testimony. Opp. at 5. In fact, SoundExchange unfairly sandbagged the Services with this "supplemental testimony" by waiting, until less than three days before the record was closed, to submit testimony that the Judges had properly excluded when Prof. McFadden was on the witness stand. Indeed, at *no time* prior to the filing the Supplemental Testimony did SoundExchange notify the Judges or the Services of its intention to file additional testimony from Prof. McFadden. SoundExchange's claim (Opp. at 5) that it was prepared to present this testimony as early as April 29 — during Prof. McFadden's live testimony — merely demonstrates that it cannot possibly justify the *eleven days* it waited to do so, from May 21,when the Judges purportedly authorized the additional filing, to June 1, when SoundExchange served the Supplemental Testimony. By delaying so long, iHeartMedia and the other Services were prevented from responding or otherwise cross-examining Prof. McFadden on this additional testimony. Indeed, SoundExchange does not even *suggest* that it was prepared to bring back Prof. McFadden — who already had been rescheduled due to substantial availability problems — for additional cross-examination on June 2 or June 3 before the hearing concluded.

Had SoundExchange given *any* advance notice of its intent to file supplemental testimony, at least the parties could have had a realistic conversation about the feasibility of bringing him back to complete his cross-examination. Instead, SoundExchange is now seeking to submit unreliable, untested new testimony in a manner that is both misleading to the Judges and to the truth-seeking process provided by a full evidentiary hearing where all Parties have an opportunity to join issues and challenge witness assertions. This prejudice is exacerbated by the

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not because it is somehow "critical," but because it was submitted in a way that substantially prejudices the Services and contravenes the rules applicable to expert testimony throughout this proceeding.

fact that Prof. Hauser was *not even permitted* during his rebuttal testimony to discuss the tabulations regarding the very same questions that Prof. McFadden now addresses. *See* Tr. at 5637:2-5638:10 (Hauser); Tr. at 5609:17-5611:11 (Hauser).

Third, the new analysis Prof. McFadden performs and the opinions he offers — based on evidence that is *not* in the record — is also highly misleading, as it takes only a handful of "close out" questions included at the end of Prof. Hauser's qualitative study to suggest that the clear confusion that respondents had demonstrated during the remainder of the study should be ignored. *See* Opp. at 2 n.1. For example, it is not enough that respondents to a single question to the qualitative study might have said that they would have made "the same choices if they were spending their own money." *Id.* What is important is whether, when respondents made these choices during the survey, they actually *understood* the choices they were making; and as demonstrated by remainder of the qualitative study (which Prof. McFadden ignores), the vast majority of respondents did not actually understand them.[2] Similarly, if presented with Prof. McFadden's testimony and new opinions regarding the product feature descriptions during the hearing, Prof. Hauser would have testified, in detail, that the fact that a number of respondents might have said that they understood the feature descriptions in response to a single general question does not show that they actually *did* understand those features. Instead, it had already been demonstrated in the substance of the qualitative study itself — conducted using *Prof. McFadden's own survey instrument* — that some 68% of the respondents did not, in fact,

[2] *See* Hauser WRT Ex. 2 (IHM Ex. 3134) (showing that at least 74 percent of respondents did not understand incentive alignment language). For example, if a respondent misunderstood Prof. McFadden's study to *require* her to spend the entire $30 gift card or else forfeit it — when in fact she could keep whatever amount she did not spend — that respondent might overvalue a plan in Prof. McFadden's survey that cost more money just to avoid forfeiting some of the money, even if she actually preferred a free plan. If she then said that she would have made the same choices again when she responded to Question 34 of the close-out questions — because she believed that she understood the choice she was making — that does not show that she was not confused.

understand one or more of the seven features when asked specifically about them.[3] Thus, SoundExchange is simply wrong (Opp. at 5-6) that this new, untested testimony would not be potentially prejudicial to iHeartMedia and the Services if it were admitted without the benefit of cross-examination of Prof. McFadden and a response to it.

For the foregoing reasons, and for those stated in the Motion, the "Supplemental Testimony" of Prof. Daniel R. McFadden should not be admitted.

Dated: June 18, 2015

Respectfully submitted,

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[3] *See* Hauser WRT Ex. 12 (IHM Ex. 3145) (showing that only 17 out of 53 respondents, or 32 percent, understood all seven features, and that only six, or 11 percent, understood all seven features *and* the incentive alignment).

CERTIFICATE OF SERVICE

I, John Thorne, hereby certify that a copy of the foregoing iHeartMedia, Inc.'s Reply In Support of Motion to Strike SoundExchange, Inc.'s "Supplemental Testimony" of Professor Daniel R. McFadden has been served on this 18th day of June 2015 on the following persons:

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